

No. 50824-9-II

**THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

POTELCO, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

FILED
COURT OF APPEALS
DIVISION II
2018 JAN 24 PM 1:14
STATE OF WASHINGTON
BY _____
DEPUTY

POTELCO, INC.'S REPLY BRIEF

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I. INTRODUCTION

For the reasons stated in its Opening Brief and explained below, substantial evidence does not support alleged Violations 1-1(a) or 1-1(c), and Potelco respectfully requests that the Court vacate those alleged Violations.

II. ARGUMENT

A. Alleged Violations 1-1(a) and 1-1(c) Should be Vacated Because the Pole Did Not Breach the MAD

The Department argues that Mr. Morrison's shock and testimony that there was an electrical arc establishes that the pole entered the MAD. RB at 14–15. The Department does not explain how an electrical arc establishes that the pole breached the MAD, or how this constitutes substantial evidence when all crew members testified they did not see the pole enter the MAD and the Department's own inspector testified he does not actually know if the pole entered the MAD. (Morrison 87:13; Street 103:23; Chase 117:11–15; Circulado 125:2; Maxwell 64:25.) Because the pole did not enter the MAD, it necessarily follows that the crew was not working in the MAD.

Furthermore, contrary to the Department's assertion, Potelco did take exception to the Board's finding that the pole entered the MAD in its first Assignment of Error regarding Finding of Fact No. 3, in which the Board erroneously found that "employees of Potelco, Inc., setting a

transmission pole allowed the pole to encroach within the minimum approach distance[.]”

Substantial evidence does not support the Board’s findings and alleged Violation 1-1(a) and 1-1(c) should both be vacated.

B. The Department Cannot Raise New Arguments on Appeal

In support of its argument that this Court should not vacate alleged Violation 1-1(c), the Department claims for the first time that Potelco misunderstands WAC 296-45-385(1)(c). That section requires employers to ensure that employees wear electrical protective equipment or uses insulated devices when handling a pole set, moved, or removed “near” an unexposed energized overhead conductor. The Department states, without any support, that although “near” is undefined, it must mean something greater than the minimum approach distance. RB at 20.

The Department did not raise this argument before the Superior Court and is estopped from doing so now. *Wash. Fed. Savings v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013) (citing *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009)).

III. CONCLUSION

For the reasons discussed above and in Potelco’s opening brief, Potelco respectfully requests that the Court vacate alleged Violations 1-1(a) and 1-1(c) because substantial evidence does not support the

Department's contention that the transmission pole entered the MAD or made contact with the energized line.

DATED this 18th day of January, 2018.

FOX ROTHSCHILD LLP

By  _____

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Attorney for Potelco, Inc.

CERTIFICATE OF SERVICE

I, Ashley Rogers, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Respondent/Cross-Appellant Potelco, Inc. in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On January 18, 2018, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email and mail, and addressed as follows:

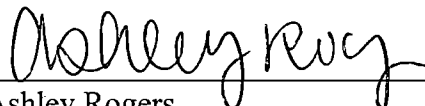
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 18th day of January, 2018.

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Ashley Rogers